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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 3

UNITED STATES OF AMERICA, EX. REL. AUDREY M. TOTH, PETITIONER

v.

DONALD A. QUARLES, SECRETARY OF THE UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

During the oral reargument of this case questions arose as to whether Congress, having undertaken to subject persons like Toth to trial by court-martial for offenses of the type involved here, had adequately provided in Article 9 (50 U. S. C. 563) for the "arrest or confinement" of such persons. The difficulty centered specifically on the language of Article 9 (c) providing that "[a]n officer, a warrant officer, or a civilian subject to this code *or to trial thereunder* may be ordered into arrest or confinement *only by a commanding officer to whose authority he is subject*" (emphasis added). At the request of Mr. Justice Reed, this memorandum is submitted

to clarify this point. We invite the Court's attention to our discussion of the problem at pp. 40–44 of the Government's original brief. Here, we expand that discussion in an effort to erase petitioner's suggestion (Pet. Br. 42) that Congress legislated in a "confounding or abortive manner"—that, though it clearly attempted to supply the procedures implementing the jurisdiction conferred by Article 3 (a), it slipped and failed to do so in the language of Article 9 written specifically for this purpose.

I

ARTICLE 3 (A) SUBJECTS PERSONS LIKE TOTH TO MILITARY JURISDICTION FOR TRIAL BY COURT-MARTIAL

This is a preliminary point, basic to what follows. In his brief (p. 38), counsel for petitioner expressly conceded "that the purpose of Article 3 (a) is to permit trial by court-martial of discharged servicemen." There has been some suggestion, however, playing about the word "amenability" in Article 3 (a), that Congress failed even to accomplish this purpose. It is important at the outset of this memorandum to dispel this suggestion.

Article 3 (a) of the Uniform Code of Military Justice[1] provides:

[1] While it not within the purpose for which this memorandum was requested, we note merely in passing that it is a Uniform Code of Military *Justice* with which we deal in this case. Everybody knows, though petitioner denied it in argument, that the Code was passed by a Congress bent,

(Footnote 1 continued)
not on hardening military discipline, but on insuring to the fullest extent possible the uniform and fair administration of *justice* for those subject to the Code. Thus, Professor Morgan, head of the Committee whose labors substantially produced the Code, observed that the objective was to make certain "that justice can be done to the accused" as well as "that there be no disparities between the services." *Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st Sess., on H. R. 2498*, p. 600. For a similar observation of Secretary Forrestal, see *id.*, at 598. And the civilian Court of Military Appeals created by the Code noted, in the first volume of its reports, its recognition that Congress guaranteed a pattern of rights in the Code "similar to that developed in federal civilian cases." *United States* v. *Clay*, 1 CMR 74, 77. Spelling out this thought, that tribunal went on to review some of this Court's landmark decisions on procedural due process to mark the direction of its intended approach. See *id.* at 78–80. And the subsequent years have given concrete testimony in case after case that the Congressional purpose to insure American standards of justice under the Code is to be scrupulously heeded. To cite only random and quickly discovered examples, the Boards of Review and Court of Military Appeals have enforced with rigor prohibitions against unreasonable searches and seizures (*e. g., United States* v. *Thomas*, 4 CMR 729; *United States* v. *Guest*, 11 CMR 758), against infringements of the very extensive rights under the Code to the effective assistance of qualified counsel (*e. g., United States* v. *Sizemore*, 10 CMR 70; *United States* v. *Lam*, 17 CMR 697), and against confessions unlawfully procured (*e. g., United States* v. *Branch*, 10 CMR 417; *United States* v. *Josey*, 14 CMR 185, 195–196)—this latter category including confessions obtained where there was not strict compliance with the duty to warn the accused of his right under Article 31 to remain silent and that incriminating statements may be used against him (*United States* v. *Hernandez*, 16 CMR 39), a requirement which goes beyond the usual rules on this subject in civilian tribunals (*Wilson* v. *United States*, 162 U. S. 613, 623; *Powers* v. *United States*, 223 U. S. 303, 313).

> Subject to the provisions of article 43,[2] any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from *amenability to trial by courts-martial* by reason of the termination of said status. [Emphasis added.]

Congress could not have spoken more plainly to confer upon the military jurisdiction to subject persons like Toth "to trial by courts-martial * * *." It is frivolous to argue, as petitioner has apparently attempted to do, that the word "amenability" fritters Article 3 (a) away as a kind of moral, unenforceable judgment of what ought to be. "Amenable," Webster teaches, means "liable to be

---

[2] Article 43 is the statute of limitations, expressly made available as a defense in a prosecution under Article 3 (a). For five offenses—desertion or absence without leave *in time of war*, aiding the enemy, mutiny, or murder—there is no limitation. Desertion and absence without leave, both matters of military record when they occur, are extremely unlikely ever to be subjects of Article 3 (a) prosecutions—*i. e.*, offenses undiscovered or not prosecuted before the defendant's discharge. Mutiny is similar in this respect. Thus, of the five, only murder and aiding the enemy are liable to be involved in such cases. And as to murder, with which we are concerned here, it is of course almost universally the rule that there are no limitations on the time for prosecution. See, *e. g.*, 18 U. S. C. 3281.

brought to account or judgment; answerable." Squarely within the opening language of Article 3 (a), Toth is a "person charged" with an offense of the kind the Article describes, committed while he was an airman—*i. e.*, "in a status in which he was subject to this code * * *." While in that status, he was "amenable" to trial by court-martial. Article 3 (a) declares unambiguously that his discharge—"the termination of said status"—is not to relieve him from such "amenability."

Further discussion could make the statutory meaning no clearer than it is rendered by the plain language Congress chose.[3] Leaving aside the important question of constitutional power, which is not a subject of this narrow memorandum, there is no doubt that Article 3 (a) extends court-martial jurisdiction over persons like Toth.

II

ARTICLES 7 AND 9, SPECIFICALLY TAILORED TO IMPLEMENT ARTICLE 3 (a), AUTHORIZE APPREHENSION AND ARREST OR CONFINEMENT OF PERSONS SUBJECT TO THE JURISDICTION OF COURTS-MARTIAL UNDER ARTICLE 3 (a)

Articles 7 and 9 deal with the apprehension (taking into custody) and arrest (moral restraint) or confinement (physical restraint) of

[3] In our main brief (pp. 20–24), we sketch the legislative history which points with equal clarity to the conclusion that persons like Toth were intended to be subject to court-martial jurisdiction under Article 3 (a).

persons subject to military jurisdiction. For most such persons, military jurisdiction extends to matters like assigning their duties, controlling their movements, and regulating their daily conduct in accordance with the Uniform Code of Military Justice, because they are in a "status in which [they are] subject to this code." For the narrow class of persons like Toth, who are no longer "subject to this code" for their conduct today, the jurisdiction exists only because they remain, for offenses while they were in service, amenable "to trial thereunder" (Articles 7 and 9)—*i. e.*, under the code. Congress tailored the pertinent provisions of Articles 7 and 9 to deal precisely with both classes. Here we undertake to explicate the meaning of these provisions and their exact application to Toth. We shall show how the military jurisdiction conferred in Article 3 (a) is clearly effectuated by the authority to apprehend in Article 7 and the authority to arrest or confine in Article 9. We shall demonstrate how the authority created by Article 3 (a), like all military authority (however broad or narrow), is exercised by commanding officers and others acting under orders. And we shall show that Congress spoke meaningfully and with clarity when it referred, for persons like Toth as well as other classes specified in Article 9, to "a commanding officer to whose authority he is subject * * *." For Toth and those like him, the

"authority" is the accompaniment of the jurisdiction conferred by Article 3 (a), and, as the record shows, was reposed in an appropriate commanding officer *by orders*. This is how all military authority is given to commanding officers. And it makes no difference that, for purposes other than those of Articles 3 (a), 7, and 9, Toth had no "commanding officer" who could assign his daily duties, etc.

1. To outline the procedures in their order, we start with apprehension, under Article 7, which presents no basis for the "*casus omissus*" petitioner has undertaken to carve through the phrase "commanding officer" in Article 9 (c). "Apprehension is the taking into custody of a person"—Article 7 (a)—the civilian counterpart of which is commonly described as "arrest."[4] Article 7 (b) provides:

> Any person authorized under regulations governing the armed forces to apprehend persons subject to this code *or to trial thereunder* may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it. [Emphasis added.]

As was pointed out on the oral argument, the words we have italicized—"or to trial thereunder"—were added to the bill which became the Uniform Code after the inclusion of Article 3

[4] See our original brief, p. 42, fn. 16.

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(a).[5] The plain purpose of the addition was, of course, to cover precisely persons like Toth who, though not "subject to this code" for offenses at the time of their apprehension are "subject * * * to trial thereunder" by virtue of Article 3 (a).

The effectiveness of this apprehension provision appeared to present no problem at the argument and need not be labored here. It may be helpful, however, to trace the steps in its application to Toth. Like the rest of the Code, and like previous military codes for many years past, Article 3 (a) is implemented and restricted by Presidential regulations in the Manual for Courts-Martial (1951). See Article 36 of the Uniform Code of Military Justice. Safeguarding the power conferred by Article 3 (a), paragraph 11b of the Manual permits the exercise of this power only with "the consent of the Secretary of the Department concerned." And so in

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[5] The original bill which became the Uniform Code did not contain the provision under which Toth is being prosecuted. During the House Hearings, this Court's decision in *Hirshberg* v. *Cooke*, 336 U. S. 210, was considered, and the provision here in issue was written to fill the gap that case disclosed. See our main brief, pp. 20–24. The Senate Committee accepted this change, and also added to Articles 7 and 9 the words "or to trial thereunder," which first appear in H. R. 4080 as reported by this Committee, and which cover specifically apprehension and arrest or confinement in cases of this type. Compare *Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, on S. 857 and H. R. 4080, 81st Cong., 1st sess.*, pp. 3, 4, with S. Rep. No. 486, 81st Cong., 1st sess., pp. 5, 8.

this case, after investigation of the charges against Toth (R. 19; see also R. 54–55, 57),* the Acting Secretary of the Air Force, satisfied that there was probable cause to believe Toth guilty of the alleged murder, ordered the Air Provost Marshal to apprehend and deliver Toth to the Commanding General, Fifth Air Force (R. 19–20). This same order, directed to the Fifth Air Force Commanding General through the Provost Marshal (R. 19), authorized the former to proceed with the court-martial charges (R. 20). The order for apprehension was duly passed through appropriate military channels (beginning with the Provost Marshal) and executed by officers and enlisted men assigned to this duty (R. 75–76, 77, 78).

We arrive, then, at this point. The statutory power to try Toth by court-martial (Article 3 (a)), and to take him into custody for this purpose (Article 7), is clear and has been duly exercised in this case. Does the whole edifice fall, as he claims, for want of further authority to confine him for trial? This involves Article 9, which, we think, answers beyond doubt the suggestion that Congress failed at this last point to effectuate its plain purpose.

2. Article 9 provides in pertinent part:

> (a) Arrest is the restraint of a person by an order not imposed as a punishment

* Contrary to a statement of counsel for petitioner on rebuttal during the reargument.

for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

* * * * *

(c) An officer, a warrant officer, or a civilian subject to this code *or to trial thereunder* may be ordered into arrest or confinement *only by a commanding officer to whose authority he is subject,* by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. [Emphasis added.]

* * * * *

(e) Nothing in this article shall be construed to limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

As in Article 7, the words "or to trial thereunder" were added to deal with persons like Toth—a civilian not "subject to this code" but "subject * * * to trial thereunder."

It is claimed, however, that this pointed effort fails because, for such persons, there is no "commanding officer to whose authority" they are subject. The invented *casus omissus* disappears upon analysis. To be sure, Toth and others in his class have no "commanding officer" to whose authority they are subject in the sense that, *apart from the court-martial power,* their daily comings and goings are subjects of military command.

But there is, nevertheless, military "authority" (jurisdiction) over such persons for the purposes and under the grant of Article 3 (a). Like all military authority, this authority is distributed to appropriate "commanding officers" by orders within the military establishment. This may be illustrated by considering first how a commanding officer comes to have authority over anybody at all and then how the pattern applies similarly to persons who, like Toth, are subject to military jurisdiction only for court-martial purposes.

Consider Lt. Jones or Mr. Smith, a civilian accompanying the armed forces outside the continental limits of the United States.[7] Lt. Jones is assigned to X Battalion and is under the command of the battalion commander, Lt. Col. Brown. Mr. Smith serves under the same "commanding officer." Both are subject to very extensive regulation by Lt. Col. Brown, who is their commanding officer. But no statute says this in terms. No regulation specifically makes Lt. Col. Brown their commanding officer. They are in his command, and he is their commander, by virtue of orders distributing military authority and responsibility. The reason his control over them is extensive is that military authority over persons in their situation is extensive. And appropriate orders delegating that extensive authority confide it in Lt. Col. Brown.

[7] Such a civilian is subject to court-martial jurisdiction under Article 2 (11) of the Uniform Code.

With respect to Toth, on the other hand, there is also military authority—much more limited it is true, but equally real and equally assignable to appropriate commanders. *The authority over him is the power to try him by court-martial, and to apprehend and confine him for that purpose.* Like most other powers in the national military establishment, this authority is assigned to and executed by appropriate commanders. No statute or regulation expressly names Toth's "commanding officer" for this purpose any more than it names the commanding officer of Lt. Jones or Mr. Smith—or of a deserter whose unit has been deactivated but who remains subject to apprehension and arrest or confinement for trial by court-martial. In each instance, nevertheless, the power of the military exists by act of Congress and is delegated by orders to appropriate commanders.

So Congress did no vain thing when, in addition to providing for arrest or confinement of civilians "subject to this code," it aimed squarely at persons like Toth by adding civilians "subject * * * to trial thereunder * * *." With all civilians, as with officers and warrant officers, Congress restricted the power of arrest[8] and con-

[8] For clarity, we note again that "arrest" in Article 9 means "restraint" (and "confinement" means "physical restraint") while the "apprehension" provided for in Article 7 is the "taking into custody" usually described as "arrest" in civilian terminology.

finement to "*a* commanding officer to whose authority" such persons are subject. The contention that for Toth's specifically designated class there can never be any such commanding officer strains unsuccessfully to nullify the statute. The answer, to repeat it for emphasis, is that Article 3 (a) confers military authority over Toth; that this authority, like any other, is distributed through the chain of command; and that any commanding officer duly assigned authority over Toth for the purposes of court-martial under Article 3 (a) is "a commanding officer to whose authority he [Toth] is subject * * *."

Before touching upon the details of the application of this authority in Toth's case, we mention one other point about which questions were raised during argument. The second sentence of Article 9 (c) provides: "The authority to order such persons into arrest or confinement may not be delegated." Obviously this does not mean that the general of an army must order the arrest of any officer or civilian subject to his authority. There is in the military a hierarchy of commands. Depending on how particular areas of military jurisdiction are distributed, a given individual frequently has more than one "commanding officer to whose authority he is subject"—in the Air Force, for example, a wing, group, or squadron commander. Thus the commanding officer to whose authority a civilian "subject to this code"

is answerable depends on the individual or individuals to whom this portion of the military power has been assigned. Similarly with Toth, or persons like him "subject * * * to trial" under the Code, the determination of which "commanding officer" is one to whose authority he is subject is made by examining the orders assigning this head of military jurisdiction. The prohibition against delegation of authority *to order* (as distinguished from executing the order) arrest or confinement of officers or civilians simply insures that this authority will never be exercised by anyone less than a "commanding officer"—so that, for example, an officer without command authority or a first sergeant may never be given the power to order such arrests.

As we have noted (*supra*, p. 9), the order of the Acting Secretary authorized the Commanding General, Fifth Air Force, to exercise the court-martial power over Toth. We have also pointed out that Toth's *apprehension* conformed to Article 7. And so the order of the Commanding General, Fifth Air Force, confining Toth when he was delivered to Korea was unquestionably valid under Article 9 (c) of the Code.[9]

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[9] The order of confinement is not in the record (but see R. 9), since it has never been, and is not now, disputed that the Fifth Air Force Commanding General duly made such an order once Toth was delivered into his authority. The contention here, as below, is simply that there could not be an officer anywhere who could order Toth's confinement.

While, in military usage under the Code, Toth's "confinement" under Article 9 began after his arrival in Korea, with the restraint theretofore being part of the precedent process of apprehension and delivery, it would make no difference in this case if the earlier period from his apprehension to delivery in Korea were also viewed as "confinement." For, as we have observed, each step in the procedure, beginning with the Acting Secretary's order, was under the direction of an appropriate "commanding officer" (R. 68, 75–76, 77, 78).[10]

Nevertheless, we note, on advice from the Air Force, that, although Article 9 (c) makes an oral as well as a written order sufficient for confinement, Toth's confinement in Korea was in fact directed in writing by the Commanding General.

[10] As petitioner points out (Pet. Br. 42), paragraph 19d of the Manual for Courts-Martial provides that a "person empowered to apprehend an offender is authorized to secure the custody of an alleged offender until proper authority may be notified * * *." So, for example, if an officer stationed at Fort Meade, Maryland, is absent without leave in California, those apprehending him would notify Fort Meade's Commanding General, who would normally order his delivery, frequently under guard, to Fort Meade for trial. The procedure is the same where trial is to be at some point overseas, for the Code is "applicable in all places." Article 5. Cf. *Hironimus* v. *Durant*, 168 F. 2d 288 (C. A. 4), certiorari denied, 335 U. S. 818. And it applies equally to civilians "subject to this code or to trial thereunder * * *." Cf. *United States ex rel. Mobley* v. *Handy*, 176 F, 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904. The procedure is identical here except that, as frequently happens, the duty to apprehend and deliver to proper authority was detailed in advance by the order of the Acting Secretary (R. 19–20).

Moreover, as we have observed (note 9, *supra*), the issue here, as presented by the petition for certiorari and the argument on the merits, is purely the legal one whether the whole effort in Articles 3 (a), 7, and 9 founders on the "commanding officer" phrase, not the factual question of how confinement was actually effected. Our discussion of the facts has been designed merely to flesh out the analysis of military authority in operation as it is governed by the pertinent Code provisions. The whole, we believe, amply demonstrates that Congress knew what it was about,

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Moreover, while "confinement" of Toth in the usual sense of Article 9 began upon his delivery to Korea, we have already pointed out that his case would be no better if the "holding in custody" and delivery prior thereto were viewed as confinement. Petitioner's brief errs in the suggestion (p. 39) that the Acting Secretary could not qualify as a "commanding officer" under Article 9 (c) because he is a civilian. Actually, the Secretary is certainly described in the provision of the Manual (par. 21a (1)) petitioner quotes on this point (Pet. Br. 39, fn. 8) as an "officer * * * in charge of any * * * command who, under Article 24, has power to appoint a summary court-martial." The Secretary, listed only second to the President in the list of those empowered under Article 22 to appoint *general* courts-martial, is thus authorized by Article 24 (a) (1) to appoint a summary court-martial. (Article 24 (a) (1) gives this power to "any person who may convene a general or special court-martial * * *.") And the Secretary's command is, of course, the entire Air Force. 5 U. S. C. 626. It would come as a stunning surprise to those in the Air Force to learn that a lieutenant commanding an "auxiliary airfield" has a power to order arrest or confinement which is denied to the Secretary. Petitioner's suggestion that this is so is absurd.

and that the important issues of constitutional power in this case cannot be escaped by petitioner's insistence on reading only futility in the clear, orderly, and perfectly apt terms through which Congress expressed its purpose.

Respectfully submitted.

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